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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

Innovation Law Lab, *et al.*,

*Plaintiffs,*

v.

Kirstjen Nielsen, *et al.*,

*Defendants.*

CASE NO.: 3:19-CV-00807-RS

**PLAINTIFFS' MOTION TO CONSIDER  
PLAINTIFFS' EVIDENCE AND REQUEST  
TO SET A BRIEFING SCHEDULE FOR A  
MOTION TO COMPLETE THE  
ADMINISTRATIVE RECORD;  
MEMORANDUM IN SUPPORT OF  
PLAINTIFFS' MOTION AND  
OPPOSITION TO DEFENDANTS'  
MOTION TO STRIKE**

**Date:** TBD

**Time:** TBD

**Courtroom:** 3, 17<sup>th</sup> Floor

**Judge:** Hon. Richard Seeborg

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1 PLEASE TAKE NOTICE that Plaintiffs respectfully request that the Court consider the  
2 evidence submitted in support of their Motion for Temporary Restraining Order (now Preliminary  
3 Injunction). A hearing has not yet been scheduled.

4 As set forth more fully in the accompanying Opposition to Defendants' Motion to Strike /  
5 Memorandum in Support of Plaintiffs' Motion to Consider Plaintiffs' Evidence, the vast majority of  
6 Plaintiffs' evidence supports their arguments on standing and the non-merits injunction factors—  
7 irreparable harm, balance of the equities, and public interest. It is well established that courts may  
8 consider such evidence in administrative record cases. In addition, the Court may consider  
9 Plaintiffs' evidence cited in support of their claim that Defendants' forced return policy is arbitrary  
10 and capricious in violation of the Administrative Procedure Act because such evidence "is  
11 necessary to determine 'whether the agency has considered all relevant factors and has explained its  
12 decision,'" as well as "'to explain technical terms or complex subject matter.'" *Lands Council v.*  
13 *Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting *Sw. Ctr. for Biological Diversity v. U.S.*  
14 *Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)).

15 In opposing Defendants' Motion to Strike and filing the instant Motion to Consider  
16 Plaintiffs' Evidence, Plaintiffs do not concede that the administrative record is complete. To the  
17 contrary, Plaintiffs believe that the administrative record was not properly compiled and is  
18 incomplete. Because the contents of the administrative record are in dispute, Plaintiffs also do not  
19 concede that all of their evidence is extra-record.

20 Defendants' counsel did not inform Plaintiffs' counsel during negotiations over the  
21 stipulated briefing schedule that they intended to produce the administrative record prior to the  
22 completion of briefing on the preliminary injunction. Accordingly, no deadlines for production of  
23 the administrative record or motions concerning the proper contents of the administrative record  
24 were built into the stipulated briefing schedule. *See* ECF No. 30. Defendants' counsel first  
25  
26  
27  
28

1 informed Plaintiffs' counsel that they would be filing an administrative record with the Court on  
2 March 1, 2019, the same day it was filed. *See* ECF No. 43. Because the stipulated proposed  
3 briefing schedule did not include any time for the parties to meet and confer concerning the  
4 contents of the administrative record, or any deadlines for Plaintiffs to file motions concerning the  
5 proper contents of the administrative record, Plaintiffs now request that the Court enter a schedule  
6 that would permit any disputes concerning the proper contents of the administrative record to be  
7 resolved on a separate track from Plaintiffs' Motion for Preliminary Injunction.

8  
9 Plaintiffs propose that resolution of the disputes over the contents of the administrative  
10 record proceed on a separate schedule to avoid any delay in the Court's resolution of their Motion  
11 for Preliminary Injunction. Accordingly, the Court may assume for purposes of deciding Plaintiffs'  
12 Motion for Preliminary Injunction, as well as their Motion to Consider Plaintiffs' Evidence and  
13 Defendants' Motion to Strike Extra-Record Evidence, that the administrative record is complete at  
14 this time, without prejudice to Plaintiffs' ability to bring a motion to complete the record pursuant  
15 to a separate schedule entered by the Court.<sup>1</sup>

16  
17 The parties have conferred. Defendants oppose Plaintiffs' Motion to Consider Plaintiffs'  
18 Evidence and Plaintiffs' proposed schedule for resolving disputes concerning the proper contents of  
19 the administrative record. Defendants have indicated that they intend to propose their own  
20 schedule.

## 21 INTRODUCTION

22 Plaintiffs respectfully request that the Court consider the evidence submitted in support of  
23 their Motion for Temporary Restraining Order (now Preliminary Injunction). It is well established  
24

25 <sup>1</sup> Plaintiffs have filed a single brief opposing Defendants' Motion to Strike Extra-Record Evidence  
26 and supporting Plaintiffs' Motion to Consider Plaintiffs' Evidence because the arguments as to each  
27 are identical. Plaintiffs therefore do not believe that filing a Motion to Consider Plaintiffs'  
28 Evidence—which was necessitated by Defendants' decision to file an administrative record—  
should affect the timing of Defendants' final brief regarding Plaintiffs' evidence supporting their  
Motion for Preliminary Injunction as set out in the stipulated briefing schedule. *See* ECF No. 31.



that the Court may consider evidence outside the administrative record in support of Plaintiffs' standing arguments and request for injunctive relief. And indeed, the vast majority of Plaintiffs' declarations and exhibits support their arguments on standing, irreparable harm, balance of the equities, and public interest. In addition, the Court may consider Plaintiffs' evidence cited in support of their claim that Defendants' forced return policy is arbitrary and capricious in violation of the Administrative Procedure Act because such evidence "is necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,'" as well as "to explain technical terms or complex subject matter.'" *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005) (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)).<sup>2</sup>

Defendants suggest that Plaintiffs should have acknowledged earlier that their evidence was outside the administrative record and criticize Plaintiffs for not having moved earlier to challenge the administrative record as incomplete or to ask the Court to consider extra-record evidence. *See* ECF No. 45 at 3, 6-7. But doing so would have been premature, as Defendants had not yet produced the administrative record when Plaintiffs filed their Motion for a Temporary Restraining Order. Indeed, Defendants' counsel never informed Plaintiffs' counsel during negotiations over the stipulated briefing schedule that they intended to produce the administrative record prior to the completion of that schedule. Plaintiffs therefore had no way to know what evidence would be

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<sup>2</sup> This case does not arise solely under the Administrative Procedure Act (APA). Plaintiffs' Fifth Claim for Relief is a claim for violation of the customary international law prohibition on *refoulement*, cognizable under the Alien Tort Statute (ATS). *See* ECF No. 1 (Compl.) ¶¶ 171-178. Plaintiffs have not yet moved for relief on that claim; rather, they have moved for preliminary relief only on their APA claims. Because Plaintiffs have not yet sought relief on their ATS claim or supplied the Court with any briefing as to its contours beyond the Complaint, the Court should not decide now whether that ATS claim requires a "fundamentally similar" analysis to Plaintiffs' APA claims and so can be decided solely based on the administrative record or whether it requires the consideration of evidence outside the administrative record. *Jiahao Kuang v. U.S. Dep't of Def.*, 2019 WL 293379, at \*2 (N.D. Cal. Jan. 23, 2019).

1 included in the administrative record.<sup>3</sup>

2 Because Plaintiffs had no opportunity to meet and confer with Defendants concerning the  
3 contents of the administrative record or file a motion to complete the record, Plaintiffs do not agree  
4 that the administrative record is complete at this time. However, for the purposes of deciding  
5 Defendants' Motion to Strike, Plaintiffs' Motion to Consider Plaintiffs' Evidence, and Plaintiffs  
6 Motion for a Preliminary Injunction, the Court may assume that the administrative record is  
7 complete, without prejudice to Plaintiffs' ability to bring a subsequent motion to complete the  
8 record.  
9

10 For the reasons that follow, even assuming arguendo the administrative record is complete,  
11 the Court should grant Plaintiffs' Motion to Consider Plaintiffs' Evidence and deny Defendants'  
12 Motion to Strike Extra-Record Evidence.

13 **I. DEFENDANTS CONCEDE THE COURT CAN CONSIDER PLAINTIFFS'**  
14 **EVIDENCE IN SUPPORT OF STANDING**

15 Defendants concede, as they must given clear Ninth Circuit law, that the Court may consider  
16 Plaintiffs' evidence submitted in support of standing. *See* ECF No. 45 at 6 ("plaintiffs challenging  
17 agency action and seeking preliminary injunctive relief can introduce de novo evidence to support  
18 their allegations of Article III injury"); *id.* at 12.<sup>4</sup> *See* *Nw. Env'tl. Def. Ctr. v. Bonneville Power*  
19

20 <sup>3</sup> Moreover, courts routinely decide requests for temporary restraining orders and preliminary  
21 injunctive relief in Administrative Procedure Act cases prior to the agency's production of the  
22 administrative record, and often rely on other evidence in doing so. *See, e.g., E. Bay Sanctuary*  
23 *Covenant v. Trump*, 349 F. Supp. 3d 838 (N.D. Cal. 2018) (granting temporary restraining order  
24 prior to production of the administrative record); *Inland Empire-Immigrant Youth Collective v.*  
25 *Duke*, 2017 WL 5900061 (C.D. Cal. Nov. 20, 2017) (granting a preliminary injunction prior to  
26 production of the administrative record); *Inland Empire-Immigrant Youth Collective v. Nielsen*,  
27 2018 WL 1061408 (C.D. Cal. Feb. 26, 2018) (same); *Save Our Cumberland Mountains v. Norton*,  
28 297 F. Supp. 2d 1042, 1046 (E.D. Tenn. 2003) (considering whether plaintiffs were entitled to a  
preliminary injunction "without waiting for the administrative record to be filed").

<sup>4</sup> At certain points, Defendants limit their concession to Plaintiffs' evidence submitted in support of  
organizational standing. *See* ECF No. 45 at 3, 7, 14. But Defendants offer no reason to distinguish  
between evidence submitted in support of the Organizational Plaintiffs' standing and evidence  
submitted in support of the Individual Plaintiffs' standing. Nor could they, in light of the authority  
discussed *infra*. Defendants' asserted limitation is also odd given that they do not move to strike

1 *Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997) (“We therefore consider the affidavits not in order to  
 2 supplement the administrative record on the merits, but rather to determine whether petitioners can  
 3 satisfy a prerequisite to this court’s jurisdiction.”); *see also, e.g., Save Our Sonoran, Inc. v.*  
 4 *Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005) (considering affidavits and evidence in support of  
 5 standing in APA case), *abrogated on other grounds by Winter v. Nat’l Res. Def. Council, Inc.*, 555  
 6 U.S. 7 (2008); *Env’tl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1220 (N.D. Cal. 2004)  
 7 (permitting “evidence regarding standing”); *Chesapeake Climate Action Network v. Export-Import*  
 8 *Bank of the U.S.*, 78 F. Supp. 3d 208, 217 (D.D.C. 2015) (“[P]laintiffs may submit extra-record  
 9 evidence to establish standing. . . . Indeed, if standing is not self-evident, a plaintiff ‘*must*  
 10 supplement the record to the extent necessary to explain and substantiate its entitlement to judicial  
 11 review.’”) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 900 (D.C. Cir. 2002)). Thus, Plaintiffs’  
 12 evidence in support of all the standing requirements is properly before the Court.<sup>5</sup>

## 14 **II. THE COURT CAN CONSIDER PLAINTIFFS’ EVIDENCE IN SUPPORT OF ALL** 15 **THE NON-MERITS INJUNCTION FACTORS**

16 It is likewise well established that the Court can consider Plaintiffs’ evidence in support of  
 17 their request for injunctive relief. In order to demonstrate entitlement to a preliminary injunction,  
 18 Plaintiffs must establish, in addition to likelihood of success on the merits, that they are “likely to  
 19 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in  
 20 [their] favor, and that an injunction is in the public interest.” *Saravia for A.H. v. Sessions*, 905 F.3d  
 21 1137, 1142 (9th Cir. 2018).

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23 the Individual Plaintiffs’ declarations.

24  
 25 <sup>5</sup> The evidence supporting Plaintiffs’ standing includes: ECF No. 5-1 (Declaration of John Doe);  
 26 ECF No. 5-2 (Gregory Doe Decl.); ECF No. 5-3 (Bianca Doe Decl.); ECF No. 5-4 (Dennis Doe  
 27 Decl.); ECF No. 5-5 (Alex Doe Decl.); ECF No. 5-6 (Christopher Doe Decl.); ECF No. 5-7 (Evan  
 28 Doe Decl.); ECF No. 5-8 (Frank Doe Decl.); ECF No. 5-9 (Kevin Doe Decl.); ECF No. 5-10  
 (Howard Doe Decl.); ECF No. 5-11 (Ian Doe Decl.); ECF No. 20-4 (Cutlip-Mason Decl.); ECF  
 No. 20-5 (Wolfe-Roubatis Decl.); ECF No. 20-6 (First Manning Decl.); ECF. No 20-7 (Ramos  
 Decl.); ECF 20-8 (Sanchez Decl.); ECF No.20-9 (Brown Scott Decl.).

1 The case law is clear that the Court may consider evidence outside the administrative record  
 2 in support of each of the non-merits injunction factors—i.e., irreparable harm, balance of the  
 3 equities, and public interest. *See, e.g., Winter v. Nat’l. Res. Def. Council, Inc.*, 555 U.S. 7, 24-26  
 4 (2008) (relying on “declarations from some of the Navy’s most senior officers” and declarations  
 5 from plaintiffs regarding harm to “ecological, scientific, and recreational interests” to assess, in the  
 6 context of a preliminary injunction, the balance of the equities and the public interest); *E. Bay*  
 7 *Sanctuary Covenant v. Trump*, 2018 WL 6660080, at \*6 (N.D. Cal. Dec. 19, 2018) (denying motion  
 8 to strike extra-record evidence regarding the balance of the equities and the public interest); *Jiahao*  
 9 *Kuang v. U.S. Dep’t of Def.*, 340 F. Supp. 3d 873, 917 (N.D. Cal. 2018) (“[T]he Court is not  
 10 limited to the administrative record’ when ‘assessing how the issuance of an injunction may harm  
 11 the public interest.’”) (quoting *Nat’l Res. Def. Council, Inc. v. Evans*, 2003 WL 22025005, at \*1  
 12 (N.D. Cal. Aug. 26, 2003)); *Earth Island Inst. v. Evans*, 256 F. Supp. 2d 1064, 1078 n.16 (N.D. Cal.  
 13 2003) (considering plaintiffs’ materials submitted “in connection with the equitable and public  
 14 interest considerations that plaintiffs must address in order to obtain preliminary injunctive relief”);  
 15 *Hill Dermaceuticals, Inc. v. U.S. Food & Drug Admin.*, 2012 WL 5914516, at \*10 (D.D.C. May 18,  
 16 2012) (“[T]he Court may consider the extra-record declarations submitted by [plaintiff] to the  
 17 extent that they are relevant to the non-merits factors of [plaintiff’s] request for injunctive relief.”),  
 18 *aff’d* 709 F.3d 44 (D.C. Cir. 2013).

21 The reason that courts regularly admit and consider extra-record evidence regarding the  
 22 non-merits injunction factors is obvious: these factors generally are not addressed by the  
 23 administrative record. That is especially so in cases like this one, where the agency did not accept  
 24 public comments on the challenged policy.<sup>6</sup> “Thus, it will often be necessary for a court to take

26  
 27 <sup>6</sup> Indeed, “Defendants’ proposed evidentiary rule”—that a court is limited to the administrative  
 28 record in assessing evidence of irreparable harm to third parties, the balance of the equities and the  
 public interest—“would be particularly counter-productive where,” as here, a “disputed agency

1 new evidence to fully evaluate claims of irreparable harm . . . and [claims] that the issuance of the  
 2 injunction is in the public interest.” *Eco Tour Adventures, Inc. v. Zinke*, 249 F. Supp. 3d 360, 369  
 3 n.7 (D.D.C. 2017) (internal quotation marks omitted).

4 Nonetheless, Defendants argue that the Court should strike all evidence relied on to show “a  
 5 balance of harms under the preliminary injunction standard.” ECF No. 45 at 7. But “Defendants  
 6 have cited no authority suggesting that § 706 [of the APA] limits the scope of the evidence that may  
 7 be considered for [assessing the balance of the equities and the public interest].” *E. Bay Sanctuary*  
 8 *Covenant*, 2018 WL 6660080, at \*6. In fact, Defendants’ position “lacks any support in the text of  
 9 the APA.” *Id.* The APA “instructs a reviewing court to determine whether agency action has been  
 10 ‘unlawfully withheld or unreasonably delayed,’ . . . or whether the agency’s ‘action, findings, and  
 11 conclusions are,’ for instance, ‘arbitrary and capricious’ or ‘without observance of procedure  
 12 required by law[.]’” *Id.* (quoting 5 U.S.C. § 706). “Immediately thereafter,” the statute instructs:  
 13 “‘*In making the foregoing determinations*, the court shall review the whole record or those parts of  
 14 it cited by a party . . . .’” *Id.* (emphasis in original) (quoting 5 U.S.C. § 706). The non-merits  
 15 factors at issue on a motion for preliminary injunctive relief—irreparable harm, the balance of the  
 16 equities, and the public interest—are not encompassed in the “determinations” listed in the APA,  
 17 and so a court need not limit its assessment of them to the administrative record . *See United States*  
 18 *v. Alisal Water Corp.*, 431 F.3d 643, 654 (9th Cir. 2005) (“[T]he court will not generally infer  
 19 restrictions on inherent judicial authority from congressional silence[.]”).

22 For the same reason, the Court should reject Defendants’ argument that the Court should  
 23 strike Plaintiffs’ evidence to the extent it addresses “general conditions in Mexico or harms non-  
 24 parties are suffering,” even if such evidence was submitted in support of irreparable injury, balance

26  
 27 action is the foregoing of notice-and-comment procedures, as no entity would have been given the  
 28 opportunity to put its views or interests before the agency and thus, into the record.” *E. Bay*  
*Sanctuary Covenant*, 2018 WL 6660080, at \*6 n.6.

1 of the equities, or the public interest, and not the merits. ECF No. 45 at 9; *see also id.* at 7.

2 Moreover, courts regularly consider evidence of harms to third parties when assessing the non-  
 3 merits injunction factors. *See, e.g., E. Bay Sanctuary Covenant v. Trump*, 349 F. Supp. 3d 838, 865  
 4 (N.D. Cal. 2018) (granting temporary restraining order after considering evidence that “potential  
 5 asylum seekers are exposed to numerous harms while waiting [in Mexico] to present their claims”);  
 6 *E. Bay Sanctuary Covenant*, 2018 WL 6660080, at \*14-\*15 (granting preliminary injunction after  
 7 considering evidence that asylum seekers in Mexico face serious dangers and that noncitizens  
 8 removed pursuant to the challenged rule would face dangers of persecution in their home  
 9 countries); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 434-35 (E.D.N.Y. 2018) (considering, in  
 10 irreparable harm analysis, the impact of rescinding the Deferred Action for Childhood Arrivals  
 11 (DACA) program on “DACA recipients and their families,” employers, and the economy writ large,  
 12 and noting that the challenged decision “will profoundly disrupt the lives of hundreds of thousands  
 13 of people” (internal quotation marks omitted)).  
 14

15 The only support Defendants offer for their misguided position is language taken out of  
 16 context from the Ninth Circuit’s decision in *E. Bay Sanctuary Covenant v. Trump*, 909 F.3d 1219  
 17 (9th Cir. 2018). *See* ECF No. 45 at 9 (quoting *E. Bay Sanctuary Covenant*, 909 F.3d at 1240-41).  
 18 The language Defendants quote is from the part of the opinion discussing third-party standing, *see*  
 19 909 F.3d at 1240-41, which is not at issue in this case. And in any event, the Ninth Circuit actually  
 20 found relevant to its irreparable harm analysis the very kind of evidence regarding harms to third  
 21 parties that Defendants here ask the Court to strike. Specifically, in concluding that the government  
 22 would not be irreparably harmed absent a stay of the district court’s temporary restraining order  
 23 enjoining a regulation rendering individuals categorically ineligible for asylum if they entered the  
 24 United States between ports of entry, the Ninth Circuit noted: “[T]here is evidence in the record  
 25 suggesting that the Government itself is undermining its own goal of channeling asylum-seekers to  
 26  
 27  
 28



lawful entry by turning them away upon their arrival at our ports of entry.” *Id.* at 1254.

Finally, Defendants suggest that Plaintiffs’ evidence regarding conditions in Mexico “is not needed to show harm to the individual Plaintiffs” because “the individual Plaintiffs have submitted declarations in this case that Plaintiffs rely upon to attempt to show irreparable harm.” ECF No. 45 at 10 n.7. But there is no rule that if plaintiffs submit declarations, they are foreclosed from submitting additional evidence of irreparable harm. Nor is Defendants’ argument germane to the administrative record rule, which is concerned only with whether extra-record evidence may be considered for *merits* purposes. *See E. Bay Sanctuary Covenant*, 2018 WL 6660080, at \*5 (citing *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001)).

The Court therefore may consider Plaintiffs’ evidence submitted in support of irreparable harm, balance of the equities, and the public interest. To meet their burden on irreparable harm, Plaintiffs have submitted evidence that the Individual Plaintiffs face extreme dangers in Mexico, live in fear for their survival and ability to meet basic needs, face obstacles to meaningfully participating in the asylum process, and are in danger of *refoulement* to their home countries by the Mexican government; that Defendants’ decision to bypass notice-and-comment procedures and the 30-day grace period deprived the Organizational Plaintiffs of the opportunity to voice their serious concerns about the challenged policy; that the forced return policy frustrates the Organizational Plaintiffs’ missions and will force them to divert resources away from core services; and that the policy puts the Organizational Plaintiffs’ funding and programs at risk.<sup>7</sup> *See* ECF No. 20-1 at 20-

<sup>7</sup> The evidence supporting Plaintiffs’ irreparable harm argument includes: ECF No. 5-1 (Declaration of John Doe) ¶ 27; ECF No. 5-2 (Gregory Doe Decl.) ¶¶ 35-36; ECF No. 5-3 (Bianca Doe Decl.) ¶¶ 11, 42; ECF No. 5-4 (Dennis Doe Decl.) ¶¶ 11, 24, 26, 28; ECF No. 5-5 (Alex Doe Decl.) ¶ 28; ECF No. 5-6 (Christopher Doe Decl.) ¶¶ 12, 21, 28; ECF No. 5-7 (Evan Doe Decl.); ECF No. 5-8 (Frank Doe Decl.) ¶¶ 23, 24, 26; ECF No. 5-9 (Kevin Doe Decl.) ¶¶ 2, 17; ECF No. 5-10 (Howard Doe Decl.) ¶ 20; ECF No. 5-11 (Ian Doe Decl.) ¶ 24; ECF No. 20-3 (Rodriguez Decl.) Ex. Q at 21; ECF No. 20-3 (Rodriguez Decl.) Ex. U at 5, 18-22; ECF No. 20-3 (Rodriguez Decl.) Ex. V at 5, 7-8; ECF No. 20-4 (Cutlip-Mason Decl.) ¶¶ 18(g), 19-20; ECF No. 20-5 (Wolfe-Roubatis Decl.) ¶¶ 21-23, 25-27, 33; ECF No. 20-6 (First Manning Decl.) ¶¶ 13, 26; ECF No. 20-7 (Ramos Decl.) ¶¶ 7, 32; ECF No. 20-8 (Sanchez Decl.) ¶¶ 22, 30, 34; ECF No. 20-9 (Brown Scott

24. To show that the public interest and balance of equities weigh in their favor, Plaintiffs have submitted evidence in support of their argument that the government will not be irreparably harmed by an injunction, and that the public interest will be served by an injunction.<sup>8</sup> See ECF No. 20-1 at 24.

### III. THE COURT CAN CONSIDER PLAINTIFFS' EVIDENCE IN SUPPORT OF THEIR MERITS CLAIMS UNDER THE "RELEVANT FACTORS" AND "TECHNICAL EXPERTISE" EXCEPTIONS

When assessing the merits, the Court may consider extra-record evidence in the following circumstances: "(1) if admission is necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' (2) if 'the agency has relied on documents not in the record,' (3) 'when supplementing the record is necessary to explain technical terms or complex subject matter,' or (4) 'when plaintiffs make a showing of agency bad faith.'" *Lands Council*, 395 F.3d at 1030 (quoting *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450). "Underlying all of these exceptions is the assessment that 'resort to extra-record information [is necessary] to enable judicial review to become effective.'" *Nat'l Min. Ass'n v. Jackson*, 856 F. Supp. 2d 150, 157 (D.D.C. 2012) (quoting *Calloway v. Harvey*, 590 F. Supp. 2d 29, 38 (D.D.C. 2008)).

Of the thirteen declarations and exhibits that Defendants have moved to strike in whole or in part, see ECF No. 45 at 1, Plaintiffs cited only six in support of their merits arguments in their preliminary injunction motion.<sup>9</sup> See ECF No. 20-1 at 6 (citing Tavaréz Decl.); *id.* at 11 n.5 (citing

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Decl.) ¶¶ 23, 27; ECF No. 20-10 (Isacson Decl.) ¶¶ 13-19; ECF No. 20-11 (Shepherd Decl.) ¶¶ 8, 14-17, 23; ECF No. 20-13 (Burgi-Palomino Decl.) ¶¶ 9-10; ECF No. 20-15 (Schulman Decl.) ¶¶ 11-15; ECF No. 20-16 (Menjivar Decl.) ¶¶ 14-18; ECF No. 20-17 (Slack Decl.) ¶¶ 10-20.

<sup>8</sup> The evidence supporting Plaintiffs' argument that the government will not be irreparably harmed by an injunction and that an injunction is in the public interest includes: ECF 20-3 (Rodríguez Decl.) Ex. V at 5-7; ECF No. 20-7 (Ramos Decl.) ¶ 17; ECF No. 20-6 (First Manning Decl.) ¶ 22.

<sup>9</sup> Defendants erroneously assert that five of Plaintiffs' declarations were used to support standing and irreparable harm as well as the merits. See ECF No. 45 at 4 & n. 3 (citing Ramos Decl., Shepherd Decl., Burgi-Palomino Decl., Schulman Decl., and Slack Decl.). Plaintiffs never cited any of those five declarations in support of their merits arguments. Rather, Plaintiffs rely on them



1 Second Manning Decl., Ex. A); *id.* at 17 (citing Isacson Decl.); *id.* at 17 n.9 (citing Menjivar  
2 Decl.); *id.* at 17 n.10 (citing Rodriguez Decl., Ex. P); *id.* at 18-19 & n.12 (citing Reichlin-Melnick  
3 Decl.). The Court should deny Defendants’ motion to strike as to each of these documents.

4 **A. Declaration of Taslim Tavaréz and Second Declaration of Stephen W. Manning**

5 Although Defendants move to strike the declaration of Taslim Tavaréz (ECF No. 20-2),  
6 they provide no reason why the Court should do so. They state only that the declaration  
7 “purport[s] to submit information regarding the individual Plaintiffs.” ECF No. 45 at 4. That  
8 much is true; the Tavaréz declaration summarizes the Individual Plaintiffs’ case information  
9 available on the Executive Office for Immigration Review’s (EOIR) automated immigration court  
10 case information system and explains that the Individual Plaintiffs’ Notices to Appear (NTAs) had  
11 not been filed as of February 19, 2019. But Defendants have also moved to submit information  
12 regarding the Individual Plaintiffs, including their NTAs. *See* ECF No. 44 (requesting leave to file  
13 under seal excerpts of the Individual Plaintiffs’ Alien Files). By doing so, Defendants undermine  
14 their own request to strike the Tavaréz declaration, and concede that the Court may consider  
15 information regarding the Individual Plaintiffs’ immigration proceedings. Moreover, government  
16 records are subject to judicial notice pursuant to Federal Rule of Evidence 201(b)(2). *See, e.g.,*  
17 *City of Las Vegas, Nev. v. F.A.A.*, 570 F.3d 1109, 1118 (9th Cir. 2009) (taking judicial notice of  
18 Federal Register Notices outside of an administrative record); *United States v. \$2,164,341 in U.S.*  
19 *Currency*, 2013 WL 2458757, at \*4 (D. Ariz. June 6, 2013) (taking judicial notice of USCIS  
20 documents), *aff’d sub nom. United States v. Cornejo-Reynoso*, 621 Fed. Appx. 495 (9th Cir. 2015).  
21  
22  
23

24 Defendants’ request that the Court strike the second declaration of Stephen W. Manning is  
25 only to support their arguments on irreparable harm, balance of the equities, and public interest.  
26 *See* ECF No. 20-1 at 20-24. Accordingly, there is no basis to strike them. Likewise, Defendants  
27 move to strike Exhibits U and V to the Declaration of Rubi Rodriguez. Those exhibits are reports  
28 by human rights organizations and likewise were cited by Plaintiffs only in support of irreparable  
harm, balance of the equities, and public interest. *See* ECF No. 20-1 at 20-24. Because Plaintiffs  
have not relied on these exhibits to show a likelihood of success on the merits, there is no basis to  
strike them.

1 similarly puzzling. Defendants first state that the declaration “purport[s] to submit information  
 2 regarding the individual Plaintiffs,” ECF No. 45 at 4, and then suggest that the declaration contains  
 3 survey results the veracity of which Defendants cannot examine, *id.* at 11. But the second  
 4 Manning declaration simply attaches as an exhibit the MPP Assessment Notices given to  
 5 Individual Plaintiffs Ian Doe and Howard Doe and explains how the declarants came to be in  
 6 possession of the Notices. *See* ECF No. 20-14 & Ex. A. And Defendants themselves have now  
 7 moved to file under seal the exact same MPP Assessment Notices, *see* ECF No. 44-4 at AF132,  
 8 AF156, thereby making plain that there is no reason for the Court to strike the second Manning  
 9 declaration. *See \$2,164,341 in U.S. Currency*, 2013 WL 2458757, at \*4 (denying the  
 10 government’s lack-of-foundation objection to USCIS documents submitted by the claimant  
 11 “because the government relie[d] on a similar USCIS document”).  
 12

### 13 **B. Declaration of Cecilia Menjivar**

14 Defendants move to strike the declaration of Professor Cecilia Menjivar (ECF No. 20-16) in  
 15 its entirety, even though Plaintiffs cite it in support of their argument that the Individual Plaintiffs  
 16 are suffering irreparable harm in light of the “extreme risks” they face in El Salvador, Guatemala,  
 17 and Honduras if returned there by Mexican authorities. *See* ECF No. 20-1 at 23. For the reasons  
 18 explained above, *see* Part II *supra*, the Court may consider the declaration for that purpose.  
 19

20 To the extent Plaintiffs rely on Professor Menjivar’s declaration in support of the merits, it  
 21 is to identify a “relevant factor” the agency has not considered, *see Lands Council*, 395 F.3d at  
 22 1030: whether policies imposing harsh conditions like forced return on asylum seekers have a  
 23 deterrent effect on migration. *See* ECF No. 20-1 at 17 n.9; ECF No. 20-16 (Menjivar Decl.) ¶¶ 12-  
 24 20. To be sure, the administrative record contains documents suggesting that so-called “lax”  
 25 policies or legal “loopholes” incentivize migration to the United States. *See, e.g.*, AR 545, 548,  
 26 571, 573-74, 701, 756. But Plaintiffs have not identified anything in the administrative record that  
 27  
 28

1 addresses whether harsh policies like forced return *disincentivize* migration, even though deterring  
2 migration is one of the key justifications Defendants assert for the forced return policy. *See* ECF  
3 No. 42 at 18 (“The Secretary explained that re-calibrating incentives for migrants in this way may  
4 decrease false asylum claims . . . .”); *id.* at 19 (“another goal is to deter fraudulent asylum claims”;  
5 “the Secretary concluded that requiring some subset of aliens in removal proceedings to wait in  
6 Mexico would discourage non-bona fide asylum seekers from making the lengthy journey to the  
7 U.S. border”); *id.* at 23 (“The number of aliens arriving in the United States seeking to apply for  
8 asylum . . . is continuing to rise sharply. . . . The public interest is served by discouraging this state  
9 of affairs . . . .”).

11 Because Defendants have ignored data addressing the relationship between the imposition  
12 of harsh conditions like forced return on asylum seekers and migration flows, Plaintiffs submit  
13 Professor Menjivar’s declaration for the permissible purpose of assisting the Court in “develop[ing]  
14 a background against which it can evaluate the integrity of the agency’s analysis,” and not to  
15 counter any specific evidence on deterrence put forward by the agency. *San Luis & Delta-Mendota*  
16 *Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014); *see also id.* (“Reviewing courts may admit  
17 evidence under [the relevant factors] exception only to help the court understand whether the  
18 agency complied with the APA’s requirement that the agency’s decision be neither arbitrary nor  
19 capricious.”); *Defenders of Wildlife v. U.S. Fish*, 2016 WL 4382604, at \*9 (N.D. Cal. Aug. 17,  
20 2016) (noting that “expert declarations may be permissible . . . to argue that [the agency] ignored  
21 the best available scientific data” and explaining that “in order for Plaintiffs to argue that [the  
22 agency] ignored the best available scientific data, Plaintiffs must be available to identify and  
23 describe the omitted data”); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1162 (9th Cir.  
24 2006) (discussing an expert declaration explaining why the agency’s estimates of tree mortality  
25 rates significantly underestimated the extent of the problem and holding that the expert declaration  
26  
27  
28

1 offered in support of plaintiffs’ argument that the agency had failed to consider relevant factors was  
 2 properly considered by the district court), *abrogated on other grounds by Winter v. Nat. Res. Def.*  
 3 *Council, Inc.*, 555 U.S. 7 (2008); *California v. Ross*, No. 18-cv-01865-RS (N.D. Cal. Mar. 6, 2019),  
 4 ECF No. 205 at 116 (“Extra-record evidence also confirms that Defendants failed to consider  
 5 several important factors when deciding whether to include the citizenship question on the  
 6 census.”).

#### 7 **C. Exhibit P to the Declaration of Rubi Rodriguez**

8 Defendants also failed to consider a second relevant factor: the likelihood that instituting the  
 9 forced return policy at ports of entry will incentivize migrants to enter between ports. In light of  
 10 Defendants’ assertion that the forced return policy is intended to combat “illegal immigration,” ECF  
 11 No. 20-2 (Rodriguez Decl.), Ex. B at 1, Plaintiffs submitted a statement from the National Border  
 12 Patrol Council president, made before implementation of the policy began, regarding this relevant  
 13 factor. *See* ECF No. 20-2 (Rodriguez Decl.), Ex. P (Geneva Sands & Catherine E. Shoichet,  
 14 *Border patrol union chief: New Trump administration policy is ‘incentivizing illegal immigration,’*  
 15 *CNN*, Jan. 25, 2019)). Like Professor Menjivar’s declaration, this statement is intended to assist the  
 16 Court in “develop[ing] a background against which it can evaluate the integrity of the agency’s  
 17 analysis” and “help the court understand whether the agency complied with the APA’s requirement  
 18 that the agency’s decision be neither arbitrary nor capricious.” *San Luis & Delta-Mendota Water*  
 19 *Auth.*, 776 F.3d at 993.  
 20  
 21

#### 22 **D. Declaration of Adam Isacson**

23 Defendants move to strike the declaration of Adam Isacson (ECF No. 20-10) in its entirety,  
 24 even though Plaintiffs cite it in support of their argument that the Individual Plaintiffs are suffering  
 25 irreparable harm in light of their vulnerability to physical violence and mistreatment in Mexico and  
 26 the lack of police protection for migrants in Mexico. *See* ECF No. 20-1 at 20-21. For the reasons  
 27  
 28

1 explained above, *see* Part II *supra*, the Court may consider the declaration for that purpose.

2 Plaintiffs otherwise cite the Isacson declaration for three points: first, to support the  
3 proposition that “[a]pprehension rates at the southern border in FY 2017 were the lowest since  
4 1972,” ECF No. 20-1 at 1; second, to support the proposition that “U.S. Customs and Border  
5 Protection’s budget is at a record high,” *id.*; and third, to support the proposition that there are long  
6 backlogs of asylum seekers at ports of entry, *see id.* at 17. For the first point, the Isacson  
7 declaration relies on a public government record that Defendants included in the administrative  
8 record. *Compare* ECF No. 20-10 ¶ 4 with AR 408. For the second point, it relies on a report citing  
9 government data. *See* ECF No. 20-10 ¶ 9 (citing a report of the American Immigration Council that  
10 presents CBP budget data). And the third proposition is one that has been documented by courts  
11 and government reports. *See, e.g., E. Bay Sanctuary Covenant*, 349 F. Supp. 3d at 851, 853;  
12 Department of Homeland Security, Office of Inspector General, *Special Review – Initial*  
13 *Observations Regarding Family Separation Issues Under the Zero Tolerance Policy* at 4-6, Sept.  
14 27, 2018, <https://www.oig.dhs.gov/sites/default/files/assets/2018-10/OIG-18-84-Sep18.pdf>.  
15  
16

#### 17 **E. Declaration of Aaron Reichlin-Melnick**

18 Finally, the Court may consider the declaration of Aaron Reichlin-Melnick (ECF No. 20-12)  
19 in its assessment of the merits because the declaration “is necessary to explain technical terms or  
20 complex subject matter” and “to determine whether the agency has considered all relevant factors  
21 and explained its decision.” *Lands Council*, 395 F.3d at 1030 (internal quotation marks omitted).  
22

23 Reichlin-Melnick is a policy analyst at the American Immigration Council who “track[s]  
24 and analyze[s] immigration-related statistics produced by [DHS and EOIR], including trends in the  
25 processing of asylum seekers at the border and their outcomes once placed in removal  
26 proceedings.” ECF No 20-12 ¶ 2. Plaintiffs rely on Reichlin-Melnick’s declaration to explain  
27 technical concepts—namely, the rates at which immigrants fail to appear in removal proceedings  
28

1 and the rates at which cases originating with a positive credible fear determination result in a grant  
 2 of asylum—and to elucidate how to accurately calculate those rates. *See, e.g., Defenders of*  
 3 *Wildlife*, 2016 WL 4382604, at \*9 (utilizing declarations to “explain technical material”).

4 In particular, Reichlin-Melnick utilizes the government’s own data<sup>10</sup> to show that the  
 5 empirical claims Defendants made in conjunction with the announcement of the policy—that “nine  
 6 out of ten asylum claims are not granted by a federal immigration judge” and that asylum seekers  
 7 are highly likely to abscond once admitted into the United States, *see* AR 17—are unfounded.<sup>11</sup>  
 8 Reichlin-Melnick’s declaration is analogous to the extra-record declaration at issue in *Earth Island*  
 9 *Institute*. There, the Ninth Circuit admitted an extra-record declaration that discussed measurement  
 10 errors in the Forest Service’s analysis of tree mortality rates, helped establish that a table in the  
 11 Forest Service’s environmental impact statement was “misleading” because it did not accurately  
 12 report the findings of the studies it purported to rely on, and indicated that the agency either  
 13 “misunderstood the data” or had “understood but concealed and misrepresented the data.” *Earth*  
 14 *Island Inst.*, 442 F.3d at 1162-67. *See also, e.g., Border Power Plant Working Grp. v. Dep’t of*  
 15 *Energy*, 467 F. Supp. 2d 1040, 1050 (S.D. Cal. 2006) (admitting an expert declaration “discuss[ing]  
 16 problems in the agency’s reasoning—including purportedly incorrect assumptions about the design  
 17 of the dry-cooling system the power plants could feasibly accommodate”); *Oceana, Inc. v. Pritzker*,  
 18 126 F. Supp. 3d 110, 113 (D.D.C. 2015) (finding expert declaration “instructive with respect to the  
 19 sufficiency of [the agency’s] statistical explanation”). Because the Reichlin-Melnick declaration,  
 20 like the declaration in *Earth Island Institute*, uses the government’s own data to explain complex  
 21 subject matter and illuminate measurement errors in Defendants’ statistical analysis, it is properly  
 22  
 23  
 24

25 <sup>10</sup> Indeed, Defendants include several of the data sources upon which Reichlin-Melnick relies in the  
 26 administrative record. *Compare* ECF No. 20-12 ¶¶ 9, 12 n.13, 14 n.4, 14 n.5, 17 n.6 *with* AR 37,  
 638, 654, 661, 662, 678.

27 <sup>11</sup> Notably, Defendants do not defend the correctness of those claims in their opposition to  
 28 Plaintiffs’ motion for a preliminary injunction.

1 within the exceptions to the administrative record rule and the Court should reject Defendants'  
2 motion to strike it.

3 Furthermore, Reichlin-Melnick's declaration may be considered because it identifies a  
4 "relevant factor" the agency did not consider: the critical roles that access to counsel and detention  
5 pending removal proceedings play in determining whether asylum seekers ultimately succeed on  
6 their asylum claims. *See* ECF No. 20-12 at ¶¶ 19-24 n.7.

### 7 CONCLUSION

8 For the foregoing reasons, the Court should deny the Defendants' motion to strike extra-  
9 record evidence and grant Plaintiffs' motion to consider Plaintiffs' evidence.  
10

11 Dated: March 6, 2019

Respectfully submitted,

*/s/ Julie Veroff*

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